No. 16323

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of California Southern Division

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APPELLANT'S OPENING BRIEF

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No. 16323

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix
of the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS; JOSEPH N. POMBO; JOSEPH MARCHANT; GILBERT D. MARCHANT; MANUEL G. MARCHANT; HARRY S. GARCIA; JUAN FARINHA; FRANCISCO S. JARDIM; CARMEN SEIJO; MARIA TEIXEIRA; MANUEL JOSEPH FERNANDES; MARGARET MADRUGA; MANUEL P. AMARAL; AUGUST R. LUIS, JR.; and MARINA F. LUIS,

Appellees.

APPELLANT'S OPENING BRIEF

I

BASIS OF JURISDICTION

The initial pleading in this case was a libel of foreclosure of a preferred ship mortgage and for monies due in admiralty under the Ship Mortgage Act of 1920. 46 U.S.C. §§ 911 et seq. The pleadings alleged that the ship was located within the Southern District of California. Jurisdiction, therefore, is vested in the United States District Court for the Southern District of California. 28 U.S.C. §§ 1331, 1333. Since this was a final decision disposing of the action and this is not a matter upon which a direct review may be had in the Supreme Court of the United States, this Court has jurisdiction to review said order on appeal. 28 U.S.C. 1291. The libel of foreclosure is set forth in the record from pages 3 through 13.

II

STATEMENT OF THE FACTS

On January 4, 1957, a libel for the foreclosure of a preferred ship mortgage and for monies due was filed by the Security-First National Bank of Los Angeles against the Oil Screw SUN KING and a number of individual respondents, including Juan Seijo. (R. 3) Intervening libels were filed on behalf of J. T. Siler, Star-Kist Foods, Inc., San Diego Marine Construction Company and Raytheon Manufacturing Company. Answers to the libels were filed on behalf of the respondents, including Juan Seijo, in February, 1957. On May

3, 1957 an Interlocutory Decree establishing the validity, priority and amounts of claims and foreclosing the mortgage was entered. (R. 14) Thereafter, proposed Findings of Fact and Conclusions of Law and Final Decree were submitted to the Court, and on May 24, 1957 Objections to the Proposed Findings were filed on behalf of all respondents, including Juan Seijo. (R. 26) The Objections proposed to strike out certain paragraphs and amend certain others.

On June 23, 1957 Juan Seijo died. Pursuant to a hearing held thereafter and on September 27, 1957, the Findings of Fact and Conclusions of Law and Final Decree were entered, all without the Estate of Juan Seijo being a party to the proceedings in any way. The decree provided for a deficiency judgment in favor of the libelant and intervenors in the sum of $47,674.41, with interest at the rate of seven per cent (7%) per annum until paid, against all respondents and purportedly including Juan Seijo, as an individual.

Thereafter, the judgments were paid and an assignment from the libelant, Security-First National Bank of Los Angeles, was taken in the name of Alva Hammel, and from the intervenors in the name of Roger S. Woolley. Then, on June 25, 1958, over one year after the death of Juan Seijo, the respondents filed a Notice of Motion for the substitution of the Estate of Juan Seijo as a respondent in the place and stead of him as an individual, and to amend the judgment to make it effective against the Estate. (R. 35) On July 18, 1958, a Special Appearance in Opposition to the Notice of Motion was filed on behalf of the Estate.

Notice to Creditors of said Estate was published for the time required by law, the first publication being July 30, 1957, said Notice requiring all persons having claims against the Estate of said decedent to file them with the necessary vouchers in the office of the Clerk of the Superior Court for the County of Santa Clara within six months after the first publication, or within said period to present the same with the necessary vouchers to the Executrix at 315 First National Bank Building, San Jose, California.

None of the respondents in the above cause who moved the trial court for the order substituting said Estate as respondent in the action and amending the judgment have ever presented or made any claim against the Estate by filing a claim for contribution by the Estate for or respecting the judgment in the above cause, or by presenting such claim as they might have for contribution by the Estate for any liability or obligation arising out of the joint venture.

On October 16, 1957, Roger S. Woolley, assignee of the judgment in favor of the intervenors, filed a claim against the Estate. On March 7, 1958, this claim was rejected, and the said assignee was notified in writing as prescribed by law. Thereafter, the said assignee filed a suit on the rejected claim in Santa Clara County, California, which suit is now pending. On December 10, 1957, Security-First National Bank of Los Angeles filed a claim with the Estate in the amount of $47,543.24, which claim was also rejected on March 7, 1958 in the manner prescribed by law. To this date no suit or further action has been filed by the said bank.

During 1958 the Security-First National Bank of Los Angeles assigned its judgment to Alva Hammel. To this date no claim has been filed by the said Alva Hammel against the said Estate, nor has any suit or other action been filed by him against the Estate.

On November 6, 1958, the United States District Court for the Southern District of California entered an Order substituting the Estate as a respondent in the case and amending the Final Decree to make the Estate a party to it. (R. 44)

III

SPECIFICATION OF ERRORS

The only error specified on this appeal is that the court erred in ordering the substitution of the Estate of Juan Seijo as a respondent in the place and stead of Juan Seijo as an individual and in amending the judgment to make it effective against the said Estate.

IV

ASSUMING THAT THE LEGAL PROCEEDINGS TO DATE HAD TAKEN PLACE IN STATE COURT, THE CALIFORNIA PROBATE CLAIM STATUTE WOULD BAR ENTRY OF A JUDGMENT AGAINST THE ESTATE.

As stated above, the respondents in this action are, by their motion seeking to establish the liability of the Estate of Juan Seijo for a portion of the deficiency judgment entered and to establish their right of contribution. Their motion goes beyond seeking mere substitution of a party in an action and asks, in addition, that the judgment be made fully effective against the Estate. A claim has been filed by Roger S. Woolley, assignee of the judgment in favor of the intervenors, and a California Superior Court action against the Estate is now pending.

However, no claim has been filed by Alva Hammel, assignee of the judgment in favor of the Security-First National Bank of Los Angeles, libelant, and no action has been filed on behalf of Alva Hammel or the said bank. At no time has a claim been filed on behalf of the moving parties in this case.

Where an action is pending against a decedent at the time of his death, a party seeking to hold his Estate liable for his obligation must file a creditor's claim in the usual manner:

> "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof is made of such filing or presentation." California Probate Code, § 709.

Probate Code § 732 provides that where a judgment for money was rendered against a decedent before his death, the judgment must be filed or presented in the same manner as other claims. Besides the prohibition against recovery stated in the above section, it is further provided in California Probate Code § 716 that:

> "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator . . . "

Therefore, the failure to file or present claims has barred the entry of a judgment against the Estate. The judgment as entered by the District Court purports to allow the individual respondents a right of contribution for portions of sums paid by them and would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim. Of course, the validity of the claim filed by the assignee, Roger S. Woolley, is being litigated in State Court.

The matter of whether this rule barring actions because of failure to present claims is altered because

the question in the case at bar is raised where a Federal Court is sitting in admiralty will be covered in the next part of this brief.

V

THE FACT THAT LEGAL PROCEEDINGS TO DATE OCCURRED IN A FEDERAL COURT SITTING IN ADMIRALTY DOES NOT MAKE THE CALIFORNIA CLAIMS STATUTE INAPPLICABLE

As there has been no federal legislative or judicial pronouncement on the application of probate claims statutes in admiraly, it is submitted that state law must control.

> "The federal courts, as has been shown, have no jurisdiction, generally speaking, of the administration of estates of decedents, or over executors and administrators in the administration of their duties as such, such matters being in most respects solely for the appropriate courts of the states pursuant to the statutes thereof; and especially is it true that the mode or system provided by the particular state legislature for the presentation and allowance of claims against the estates of decedents . . ." 3 Bancroft, Probate Practice, 2d ed., 480-481 (1950).

Although in certain areas it has been necessary for Congress or the courts to promulgate a uniform general

rule to apply in admiralty, the attendant policies are not applicable in the situation at bar. In the instant case, the in rem phases of the litigation had been completed before the death of the decedent and the question remaining was solely one of the entry of an in personam judgment for the deficiency.

The United States Supreme Court clearly recognized the applicability of state law in admiralty in the case of Just vs. Chambers, 312 U.S. 383, 85 L. ed. 903, 61 Sup. Ct. 687 (1940). A petition was filed in admiralty to limit liability for the personal injuries which had occurred upon petitioner's yacht, in Florida territorial waters, due to petitioner's negligence. Subsequent to the filing, the petitioner died. The Supreme Court noted that a tort action did not survive the death of the tortfeasor under classical maritime law; it also noted that the action was properly in admiralty. Nevertheless, it permitted the claimant actions to proceed against the estate of the deceased petitioner, declaring that admiralty courts should adopt state law in such cases, where Congress has not acted. As Florida law provided for the survival of the action, the claimants prevailed. The court expressly said that this principle of following state law in admiralty cases is not limited to any particular situation such as wrongful death.

In 1955, the Supreme Court made it clear that where a Court was sitting in admiralty and no federal rule had been established to govern a particular situation the state law was to govern. In Wilburn Boat Company vs. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. ed. 337, 75 Sup. Ct. 368 (1955), an action was brought on a marine insurance contract.

The company defended upon the grounds that the insured had breached several provisions of the contract. Although the case was originally based upon diversity of citizenship, the Supreme Court treated the matter as being within federal jurisdiction.

> "Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. New England Mut. M. Ins. Co. v. Dunham (US) 11 Wall 1, 20 L ed 90. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule." (348 U.S. 313)

The Court stated that the questions in the case were these:

> "Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established Federal admiralty rule governing these warranties? (2) If not, should we fashion one?" (348 U.S. 314.)

The court answered both of these questions in the negative, stating that insurance was a field where state regulation had prevailed during the entire history of our country and that Congress had not acted at all. It was concluded that the federal courts could only establish a body of regulations for marine insurance "piecemeal, on a case by case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

The policy announced in the Wilburn Boat case supra is particularly applicable to the deficiency judgment situation in the case at bar. Classical maritime law did not afford a maritime lien for a ship mortgagee. Such protection is a recent statutory creation. See Bogart v. The John Jay, 58 U.S. 399, 15 L. ed. 95 (1854), holding that a ship mortgage was not even within the admiralty jurisdiction. Maritime law has taken cognizance of such mortgages only since the Ship Mortgage Act of 1920 (46 U.S.C. 911-984). Nothing is said therein concerning the time within which a mortgagee's claim might be asserted against the estate of a deceased mortgagor. Section 954 of the Act, which specifically covers suits in personam upon failure of the in rem action to satisfy the mortgage claim, is silent about such rights. On the other hand, the law of California, and of the several states in general, has developed a body of statutory and case law to handle such matters. Absent any evidence of congressional intention to impose upon the survivors of deceased mortgagors obligations which had not previously existed either in admiralty or at common law, that these rules of state practice should here prevail.

A. State Law Has Governed Substitutions of Estates for Parties Deceased in Pending Suits in Admiralty.

In another situation quite similar to that in the present case, federal courts have ruled that although a substitution was authorized by federal law the propriety of doing this depended upon the validity of the cause under state law. Where a party to a personal injury action dies during the pendency of the suit, federal law authorizes the substitution of the personal representative.

The courts have refused to do this unless the cause of action otherwise remained valid under state law.

In The Miramar (In re Statler) 31 F. 2d 767 (S. D. N. Y. 1929), aff'd 36 F. 2d 1021 (2nd Cir., 1930), cert. denied, 281 U.S. 752, 74 L. ed. 1163, 50 Sup. Ct. 355 (1930), the owner of a sunken vessel brought a limitation proceeding in admiralty to stay various actions brought in state and federal courts by representatives of officers and men whose lives had been lost. After hearing, but before final decision, the petitioner died. Claimants moved for an order directing that his estate be substituted in his stead. Note, that because the ship had been lost, there was no res, and the liability of the petitioner in the limitation proceeding would have been in personam only, and is thus similar to the case at bar.

> "When the deceased petitioner elected to resort to a proceeding for the limitation of his liability, if any, the result of such action was to bring the claims that were asserted against him within the application of the law that is here administered . . . a part of such law is to be found in Section 955 of the Revised Statutes (28 U.S.C.A. 2d 778) which provides that: 'when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the action survives by law prosecute or defend any suit to final judgment'. " (31 F 2d, 767, 769.) (Emphasis supplied.)

As the statute conferring the right of action did not specifically indicate whether estates could be substituted, or whether the cause of action survived, the court looked to the common law. Citing New York cases the court held the action to have abated upon the death of the petitioner.

Insofar as its construction of the Jones Act was concerned, The Miramar was overruled in Nordquist v. United States Trust Company of New York, 188 Fed. 2d 776 (2nd Cir., 1951). Its general treatment of federal and state law, and their inter-relationship, was left untouched, however.

A similar result was reached in Amoth v. United States, 3 Fed. 2d 848 (D. C. Oregon, 1925), a libel in personam for personal injury, in which the libelant died during pendency of the action, and the respondent moved to abate; the motion was granted.

> "The rule seems to be that the cause, where the libel is in personam, abates by the death of the libelant before judgment or decree, unless it is interdicted by a survival statute of the state . . ." (3 Fed. 2d 848.)

The court looked only to Oregon statutes to determine whether it should grant the motion.

These authorities dictate that a federal court should follow a state statute barring an action against an estate. A federal statute or court rule providing for the substitution of the estate in a proceeding does not breathe life into an otherwise barred cause of

action. It is merely a rule of procedure. This is particularly true of Rule 24 (a) as the Act creating the federal rules specifically provides that they shall not abridge or modify the substantive rights of any litigant. 28 U.S.C. Sec. 723, et seq.; 4 Moore, Federal Procedure, 2d ed., 522-523.

B. The "Savings to Suitors" Clause Provides for the Application of State Law in Admiralty.

The applicability of the probate claims statute in admiralty cases is further provided for by the "saving to suitors" clause. 28 U.S.C. Sec. 1333. The Judiciary Act of 1789, while bestowing exclusive admiralty jurisdiction on the federal courts, saved "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." The language, in the Judiciary Code of 1948, now reads:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors any and all cases all other remedies to which they are otherwise entitled." 28 U.S.C. Sec. 1333.

That the 1940 Act did not change the application of state law in admiralty appears from Madruga v. Superior Court, 346 U.S. 556, 98 L. ed. 290, 74 Sup. Ct. 298 (1954). The Supreme Court writing of Section 1333 said: "We take it that this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act."

There has been a great deal of litigation concerning the content of the "saving to suitors" clause. The applicability of this clause is shown by Meade v. Luksefjell, 148 F. Supp. 708 (SD N. Y. 1957), which involved a libel for personal injury in which libelant died after the action was commenced. The court noted the well known rule that maritime law did not permit such actions to survive death. It proceeded to apply the New York survival statute, saying that as Congress had not acted in the field of abatement and revival of maritime torts, New York law was to control. The court grounded its decision specifically upon the "saving to suitors" clause. The remedy to which petitioner was "otherwise entitled" was to have his cause of action survive his death.

The Meade case supra is authority for the proposition that since Congress has not acted to provide rules of non-claim against decedents' estates in maritime situations, and as the states have well defined non-claim statutes, such state statutes should constitute remedies saved to suitors in admiralty.

C. State Probate Claims Statutes Have Been Applied in Cases Where Federal Law Was Generally Controlling.

Further, it must be noted that state probate claims statutes have frequently been dispositive of cases in which federal law was generally controlling. In Mann v. Kleisdorff, 16 F. 2d 997 (5th Cir., 1927), suit was brought to recover from a stockholder in a failed national bank, pursuant to federal statutory law. The suit was not brought against the estate of the deceased

shareholder within the period provided by the Mississippi claims statute.

> "On this writ of error plaintiff contends, first, that the non-claim statute of Mississippi is inapplicable; and secondly, that it is in conflict with the federal statute, R. S. §5152, which provides that the estates and funds in the hands of executors or administrators 'shall be liable in like manner and to the same extent' as the testator or intestate would be if living." (16 Fed. 2d 992).

> "To the end that estates may be promptly settled, it is the common, if not the universal, policy of the several states to bar by legislation claims against the estates of the dead within a less period of time than is required for the assertion of claims against persons who are living. The provision in R. S. §5152, ... does not have the effect of depriving a state of the power to make a difference in the time within which claims will be barred if not presented, on the one hand, to an executor, or, on the other, to the person interested if he be living. This section has no reference to the time of presentation of a claim, but only makes the funds in the hands of the legal representative as fully liable as the deceased would be if living." (16 Fed. 2d 997-998.)

The state non-claim statute was thus held to bar an action based upon federal legislation, even though, as here, there was specific provision for the substitution

of decedent's estate as a defendant.

This Court of Appeals has rendered similar decisions in similar cases on at least three occasions. In Certain-Teed Products Corporation v. Luke, 74 Fed. 2d 384 (9th Cir., 1934), an action was brought by a corporation against the administrator of a deceased debtor. The Arizona non-claim statute required that actions against administrators be brought within three (3) months after rejection of a claim. Plaintiff contended that a federal court of equity had power to grant relief from the strict application of such statute.

> "A federal court of equity cannot relieve a claimant from the consequences of his failure to comply with the non-claim statutes of the state of the domicile of the decedent unless there is also a statute of that state permitting an action against the personal representative, notwithstanding the statutory limitation, in case justice and equity require it. This rule was stated by the Supreme Court in Security Trust Company v. Black River National Bank, 187 U.S. 211, 227 . . . as follows:
>
> " 'Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the state of the domicile, and are bound by the same rules that govern the local tribunal.' "

A similar result was reached in Tobin v. Hymers, 99 Fed. 2d 740 (9th Cir., 1938), wherein it was held

that state law governed the aspect of the case relating to claims of the estate of a decedent. See also Suffel v. Bosworth, 95 Fed. 2d 494 (9th Cir., 1938), in which a receiver in bankruptcy filed a claim against a shareholder in a national bank. Upon the shareholder's death, the claim was filed against her estate. Judgment was against the estate. The administrator appealed, contending that compliance had not been made with the California non-claim statute. On appeal the decision was affirmed, the court considering only California statutes and California cases.

There have been a number of cases where jurisdiction was based upon diversity of citizenship decided prior to 1938 where federal courts have held that probate claims statutes barred the action. Orth v. Mehlhouse, 36 Fed. 2d 367 (D.C. Minn., 1929); Goodno v. Hotchkiss, 237 Fed. 686 (D.C. Conn., 1916); Schurmeier v. Connecticut Mutual Life Insurance Company, 124 Fed. 865 (8th Cir., 1903); Newberry v. Wilkinson, 190 Fed. 62 (1911).

D. The Policy Reserving Jurisdiction to Local Courts in Admiralty Matters Supports the Application of the Probate Claims Statute

The legislative power of the federal government over maritime law has been deemed to stem from the grant of judicial power appearing in Article III, Section 2, of the Constitution. See Gilmore and Black, The Law of Admiralty 40-42. As a corollary of this proposition, it has been held that states were not competent to legislate concerning matters in admiralty which were within the exclusive jurisdiction of the

federal courts. See The Moses Taylor, 71 U.S. 411, 18 L. ed. 397 (1867); The Hine v. Trevor, 71 U.S. 555, 18 L. ed. 451 (1867); Gilmore and Black, supra, page 33-36.

Conversely, it may be said that where a state court may assume jurisdiction to act, the substantive law of the state is also competent to effect the rights of the parties. This is the thrust of Madruga v. Superior Court, 346 U.S. 556, 98 L. ed. 290, 74 Sup. Ct. 298 (1954). On certiorari to the California Supreme Court to review a denial there of a writ of prohibition to restrain the Superior Court of San Diego County from proceeding to partition a vessel, the Supreme Court affirmed. The court declared that there was a sharp distinction between a proceeding which was essentially in personam, such as a partition suit, and one in rem. Where the action was in personam, the state court could act in a case where federal law had not preempted the field; in such an area jurisdiction is concurrent. The court indicated that such an in personam action was within the "saving to suitors" clause of Section 1333.

As the instant proceeding has become one in personam against the vessel mortgagors, the in rem proceeding against the SUN KING having been completed, the Madruga holding, and the language of the Supreme Court, are important in the decision of the case at bar. The court declared that there is no national admiralty rule concerning the partition of vessels. The following language could well have been written about admiralty cases involving probate claim statutes and the substitution of estates for deceased parties.

"The scarcity of reported cases involving such partition since the Constitution was adopted indicates that establishment of a national partition rule is not of major importance to the shipping world. We can foresee at this time no possible injury to commerce or navigation if states continue to be free to follow their own customary partition procedures. Easily accessible courts are well equipped to handle these essentially local disputes. Ordering the sale of property for partition is part of their everyday work. Long experience has enabled states to develop simple legislative and judicial partition procedures with which local judges and counsel are familiar. Federal courts have rarely been called upon to try such disputes and have established no settled rules for partition." (346 U.S. 556, 563).

Writing of Madruga v. Superior Court, it was said:

"The intent of the Supreme Court appears to have been to classify partition as a 'maritime but local action.' In 'maritime but local actions' in which there is no need for uniformity, admiralty courts as well as state courts apply state law. Consequently, until Congress or the Supreme Court establishes a maritime partition law admiralty courts can properly apply state partition law." Note, 42 Cal. Law Rev. 331, 336 (1954), citing Benedict On Admiralty, 6th ed., §35.

E. State Wrongful Death Statutes Have Been Applied in Maritime Cases.

A great number of admiralty cases which involve the application of state law are those treating wrongful death situations. The holdings are analogous and the language appearing in the opinions is extremely persuasive.

The Harrisburg, 119 U. S. 199, 30 L. ed 358 (1886) is the leading case holding that, in the absence of federal legislation, where a wrongful death action is brought in admiralty under a statute of a state, it must meet all of the requirements of that statute. Thus, because the state statute of limitations was not complied with, the action failed.

In Old Dominion Steamship Company v. Gilmore, 207 U.S. 398, 52 L. ed. 264 (1907), the question was whether the Delaware Wrongful Death Act could apply to give a right arising out of a wholly maritime tort. The court, speaking through Mr. Justice Holmes, said:

> "The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction.' Art. 3, Sec. 2 . . . The doubt in this case arises as to the power of the states where Congress has remained silent.
>
> "That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and

> construed by the judiciary act of 1789 (1 Stat. at L. 77, Chap. 20, 39), 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8, . . .) leaves open the common law jurisdiction of the state courts over torts commited at sea . . . and as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the state where Congress has not acted." (p. 404.)

Writing of Puleo v. H. E. Moss, 159 Fed. 2d 842 (2nd Cir., 1949), an admiralty case wherein the New York Wrongful Death Act was applied, it was said:

> "As the state statutes---adopted by admiralty---created the rights of the parties the state law should be referred to in order to determine the validity of the claim, even though these rights are derived from death resulting from a maritime tort. A contrary result would enable the admiralty courts to apply maritime rules to the state . . . created . . . As a result, parties asserting rights under the statute arising from a tort would get preferential treatment as compared to parties claiming rights under the same statute because of a terrene tort." Stevens, Erie R.R. v. Tompkins and the

Uniform General Maritime Law, 64 Harv. L. Rev. 246, 266-267 (1950).

The same might well be said of a case wherein a decedent had mortgaged a ship and also nonmaritime chattels. In the administration of his estate, there would seem to be no reason for the maritime mortgagees to receive preferential treatment to the terrene mortgagees, in their claims for deficiency judgments. Yet, such would be the result, if the judgment of the district court is affirmed.

VI

A JUDGMENT ENTERED AGAINST A PERSON DECEASED IS ERRONEOUS AND VOID.

The foregoing proposition is well established by the authorities. Estate of Cazaurang, 35 Cal. App. 2d 556, 558 (1939) ("A court is without jurisdiction to proceed when one of the parties before it has died and there has been no substitution of any representative of the deceased."); Boyd v. Lancaster, 32 Cal. App. 2d 574, 578 (1939); Maxon v. Avery, 32 Cal. App. 2d 300, 302 (1939).

It must be emphasized that by the order which is the subject of this appeal the District Court has not only substituted the estate as a party but has gone further and purportedly amended the judgment to make it effective against the estate. As has been pointed out, a hearing on the merits was held after the death of

Juan Seijo, which resulted in the amounts of the claims being reduced. The decedent's representative was entitled to be present at that hearing and allowed to advance any defense or objection deemed appropriate as to the amount of the judgment or its share of liability. The entry of the decree itself was of course a determination on the merits of the case. Accordingly it is submitted that the judgment entered is void.

VII

THE TIME WITHIN WHICH THE JUDGMENT IN THE CASE AT BAR MAY BE AMENDED HAS EXPIRED.

The provision for altering or amending a judgment appears in Rule 59(e) of the Federal Rules and provides that the motion shall be served not later than ten days after entry of judgment. Rule 6(b) relating to extensions of time has expressly excepted Rule 59(e) from its scope. Therefore, the time may not be extended.

Authorities cited to the Court previously show that the judgment entered against a dead person is void. But even conceding for the sake of argument that the judgment is not void but merely erroneous, a judicial error has been committed and therefore one of substance and not merely ministerial. The case of Hogan v. Superior Court, 74 Cal. App. 704, 710-711 (1924) took the position that such a judgment was not void but was merely voidable. The court there stated that the error must be corrected on appeal if it shows of record and by a writ of coram nobis if it does not.

"And in Phelan v Tyler, supra (64 Cal 80) in giving the reason for the rule the court says: 'There is nothing in the Code which would justify the inference that the death of a party pending an appeal ousts the jurisdiction of the Supreme Court and renders its judgment void unless before the rendition thereof a representative of said deceased party be substituted in his stead..... The reason why, 'in such cases, the judgment is simply erroneous, but not void.....is because the court having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error coram novis if the fact must be shown aliunde." (Freeman on Judgments, 153.)' "

"A reasonable time for relief from an error of law by the court should not exceed the time allowed for an appeal." 7 Moore, Federal Procedure, 2d ed. 236-239.

Since the time for appeal has long since expired, the relief sought by the motion in the lower court was barred.

The motion is also barred for the additional reason that it has not been made "within a reasonable time" as required by Rule 60(b). The moving parties are co-defendants and all of them, including the decedent, were

represented by one counsel. Obviously these parties had knowledge of the death of Juan Seijo even before the final judgment was entered. Nothing in the record indicates that the parties did not have this knowledge.

Having this knowledge the parties must, therefore, be held to have intended that the judgment be entered as it was and that no mistake, inadvertence, etc. is present. This is supported by the fact that these parties were represented at a hearing long after the death of Juan Seijo, where they were permitted to enter objections to the Findings of Fact and Conclusions of Law.

VIII

THE JUDGMENT IS VOID AS THE AUTHORITY OF COUNSEL TO REPRESENT JUAN SEIJO AT THE HEARING HELD AFTER HIS DEATH HAD TERMINATED.

As stated before, Juan Seijo died on June 23, 1957. Thereafter a hearing was held to determine whether the liability against the respondents should be joint or joint and several. At that time the court also considered objections to the Findings of Fact and Conclusions of Law previously submitted. No authority need be cited for the proposition that the authority of an agent or attorney expires at death. Since the estate had not been made a party to the proceeding the interest of Juan Seijo could not be and was not represented at that hearing.

Accordingly, the judgment is void as to the decedent or his estate insofar as it is based upon the hearing held after his death and without his representation.

IX

THE COURT HAVING LOST JURISDICTION OVER THE PROCEEDINGS, NO IN PERSONAM JURISDICTION MAY BE ACQUIRED OVER THE ESTATE OF JUAN SEIJO.

As urged previously, the judgment entered in September, 1957 was void and this is supported by the cited points and authorities. The time to correct any judicial error has now expired. Therefore, the Court has lost jurisdiction including the jurisdiction it had over Juan Seijo prior to his death. With the expiration of this jurisdiction, the case at bar is comparable to the situation where the Court had never acquired in personam jurisdiction over the decedent.

CONCLUSION

It was urged by the appellee to the courts below that the contention of the estate in this case was based upon the "sheerest technicality." Every case in which limitation periods are involved is in a sense "technical"; the statutes here applicable have their firmest basis in the policy of the law. Probate claim statutes are universal. In many states the claim period is less than

six months. Time periods relating to the modification of judgment are regarded to be of such importance that it is often expressly provided that the time within which the motions are to be made cannot be extended. Rule 6(b), Federal Rules of Civil Procedure. The motion in this case was made over one year after the death of Juan Seijo and nine months after the judgment was entered.

Therefore it is concluded:

1. The judgment may not be made effective as to the estate since the time for filing claims has expired as set out above.

2. The Claim Statute is applicable where a Federal Court is sitting in Admiralty.

3. Failure to make the original judgment effective as to the estate is a judicial error which the court has lost the power to correct as the ten day period provided in Rule 59 and the time for filing appeals under the interpretation of Rule 60 have expired.

4. The judgment is void as the determination on the merits was made after the decedent's death without he or his estate being represented.

5. The judgment being void the court has lost jurisdiction of any proceedings relating to the interest of Juan Seijo and therefore cannot acquire in personam jurisdiction over the estate.

Accordingly, it is submitted that the decision of the District Court must be reversed.

Respectfully submitted,

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and

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